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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054

In the Matter of )  
 )  
Telecommunications Services ) CS Docket No. 95-184  
Inside Wiring )  
 )  
Customer Premises Equipment )

**Motion to Accept Late Filed Comments of  
WinStar Communications, Inc.**

WinStar Communications, Inc. ("WinStar") hereby moves for acceptance of its Comments in the above-captioned proceeding, which are filed herewith at the request of Commission staff.

WinStar's comments address only matters raised pursuant to the Commission's Notice of Proposed Rulemaking (NPRM). Acceptance of these comments will not delay the proceeding or burden any other party. The Commission is expecting these comments<sup>1</sup> in order to provide the public record in the above-captioned proceeding with heretofor unavailable information

<sup>1</sup> *In the Matter of Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network (CC Docket No. 88-57) and Petition for Modification of Section 68.213 of the Commission's Rules filed by the Electronic Industries Association (RM-5643), Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking (Released: June 17, 1997) at para. 2.*

concerning the impact of the NPRM on the deployment of fixed service facilities-based wireless communications networks designed to provide competitive local exchange service. Accordingly, we respectfully request that the Commission accept WinStar's comments.

Respectfully submitted,

**WINSTAR COMMUNICATIONS, INC.**

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Date: August 5, 1997

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Dated: August 5, 1997

## SUMMARY

Access to inside wire is a fundamental element in the provision of wireless local loop and video services. Building access is the most time consuming problem and biggest obstacle to WinStar's success in providing local competition. Current trends in the marketplace reveal that a significant percentage of building owners and operators are not providing competitive telecommunications carriers with the same nondiscriminatory access to inside wire facilities (including riser conduits, connecting equipment, ducts and elevator shafts) that they traditionally have provided and continue to provide to incumbent local exchange carriers and incumbent cable companies. Ultimately, these actions run counter to the goals and provisions of the Telecommunications Act of 1996 (the 1996 Act), which clearly provide for reasonable access to inside wiring facilities nationwide for wireless Competitive Local Exchange Carriers (CLECs).

Fixed loop wireless CLECs and Competitive Access Providers (CAPs) such as WinStar are true facilities-based carriers. Unlike resellers and fiber-based CLECs/CAPs, WinStar offers services over a network which is largely separate from that of the ILEC. The present inability of wireless CLECs like WinStar to access inside wire on a reasonable and nondiscriminatory basis is especially troubling because wireless CLECs can provide service cheaper and faster than incumbent providers. Congress did not intend for wireless providers to acquire spectrum, build a fixed local loop network of rooftop transceivers and interconnected switches, and then not be able to access the inside wire of a building. Inside wiring is absolutely essential to provide services to an end user, and such inside wiring, including pathways for wiring, must be available to wireless CLECs/CAPs on terms comparable to those *already* offered to the incumbent wire-based providers (i.e., cost-based and non-discriminatory).

Moreover, without established mechanisms for accessing inside wire facilities necessary for completing the “last hundred feet” to the end user, it is inevitable that Wall Street and other funding sources will begin to reject efforts to raise sufficient capital for investment in facilities-based CLECs--starting with any forthcoming auctions promulgated by the FCC for broadband fixed local loop spectrum. Such a result would run directly counter to the promise of new and invigorated competition in the local exchange market as contemplated in the 1996 Act.

Fortunately, the FCC has the clear Constitutional and statutory authority to issue a rule giving telecommunications providers physical access to inside wiring facilities on non-discriminatory terms, so long as the building owners are justly compensated. In taking such an action, the Commission will be fulfilling the primary objective of the 1996 Act — promoting competition among telecommunications providers to the benefit of consumers.

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**Comments of  
WinStar Communications, Inc.**

WinStar Communications, Inc. and its operating subsidiaries (collectively "WinStar"), by its undersigned counsel and pursuant to Section 1.415 of the Commission's rules, submits these comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.<sup>1</sup>

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<sup>1</sup> *In the Matter of Telecommunications Services Inside Wiring*, Notice of Proposed Rulemaking, CS Docket No. 95-184 (Released January 26, 1996).

## INTRODUCTION

WinStar is the largest holder of spectrum in the 38.6-40.0 GHz (38 GHz) band in the country, with licenses in forty-eight (48) of the top fifty (50) most populated metropolitan statistical areas in the United States.<sup>2</sup> WinStar is utilizing this spectrum to build local communications networks for the transmission of voice, data, and video traffic in the major metropolitan areas throughout the country. WinStar averages 500 MHZ of bandwidth in each of the top thirty (30) markets. The Company's licenses cover more than 160 major market areas in total, encompassing approximately 180 million people and more than 675 million channel pops (population coverage multiplied by the number of channels).

Through its wireless licenses, WinStar develops, markets, and delivers telecommunications services throughout the United States. WinStar's switching and inter-office transport facilities utilize common channel signaling (commonly referred to as CCS or SS7) along with its prerequisite database capabilities. These facilities also have a matched pair of Service Transfer Point/Service Control Point (STP/SCP) facilities to enable CCS signaling between WinStar and other carriers for advanced call set-up and CLASS features interoperability. Further, WinStar has installed, and is continuing to install, Lucent-manufactured 5ESS switches, in its major markets (see Exhibit I).<sup>3</sup> Point-to-point and wireless hub 38 GHz transmission systems, as illustrated in Exhibit II, are in various stages of buildout in

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<sup>2</sup> WinStar will have licenses in all of the top fifty (50) markets upon completion of pending acquisitions, each of which is subject to FCC approval.

<sup>3</sup> As noted above, WinStar already has operational switches in Boston, Chicago, Los Angeles, New York and San Diego. Additional switch deployment is near completion in Dallas and Washington, D.C. WinStar has attached one of its latest press releases for the Commission's review.



WinStar's installed switch cities, as well as other major markets. The hub sites will be interconnected through a fiber backbone network. In turn, these hub sites will be connected via WinStar Wireless Fiber<sup>SM</sup> links to end users. WinStar believes that a limited number of hub sites (generally less than a dozen) in each metropolitan area will allow it to address more than 70% of its targeted customers' buildings and to carry the majority of its customers' traffic on its own network instead of the higher cost facilities of other carriers.

Each WinStar city network is monitored on a twenty-four (24) hour a day, seven day a week, basis. Safeguards from link outages can be engineered through the installation of "hot standbys" that can switch on-line in the unlikely event that a primary link fails.

The high frequency microwave technology employed in WinStar's network offers equivalent capabilities of a fiber optic network, but with several distinct advantages that militate toward the use of wireless services as the preferred method of building future telecommunications infrastructure. First, WinStar's microwave network enables the provision of telephone service without the disruption, cost and delay associated with the installation of underground fiber optic cables (including avoidance of the related problems of conduit rights-of-way). Second, WinStar's high-speed radio network can make wide-band services available to small and medium sized business users on a economically attractive basis due to this ease of implementation. Third, the installation of terminal equipment is relatively simple and inexpensive, and, fourth, it can be accomplished in some cases within several days as compared to the several months required by the engineering and installation of fiber optic cable facilities.

WinStar today is authorized as a facilities-based competitive local exchange carrier (CLEC) in twenty-four (24) jurisdictions<sup>4</sup> and has applications pending in five (5) other jurisdictions.<sup>5</sup> Indeed, WinStar already has initiated switched commercial service as a CLEC in New York City, Chicago, Los Angeles, San Diego and Boston and expects to be operating as a facilities-based switched CLEC in a total of twelve major market areas by the close of 1997. WinStar also has entered into interconnection agreements which cover a vast majority of the networks managed by the Regional Bell Operating Companies (RBOCs), GTE, Sprint, and Southern New England Telephone (SNET).

WinStar also has received authority to operate as a competitive access provider (CAP) in thirty-five (35) jurisdictions<sup>6</sup> and has applications for intrastate CAP authority pending in another two (2) jurisdictions.<sup>7</sup> As of January 31, 1997, WinStar had forty carrier customers, including: Ameritech Cellular Services, MCI Communications, Pacific Bell, and Teleport Communications. WinStar Wireless Fiber<sup>SM</sup> services are fully capable of carrying voice, data, video, and other broadband and narrowband content.

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<sup>4</sup> California, Colorado, Connecticut, Washington, D.C., Florida, Georgia, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. (WinStar also has resale CLEC authority in Montana.)

<sup>5</sup> Arizona, Kansas, Louisiana, Missouri, and New Hampshire.

<sup>6</sup> Arkansas, California, Colorado, Connecticut, Washington, D.C., Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

<sup>7</sup> Arizona and New Hampshire.

WinStar is the first wireless CLEC to market. Consequently, as it begins its integrated switched network buildout — commenced in the late Fall of 1996 -- it is rapidly learning more about the limitations on its ability to access inside wire. By contrast, when this Rulemaking began, WinStar essentially was unaware of the obstacles that it has subsequently encountered. It is this recent, rapid growth in WinStar's experiential base that has led to WinStar submitting comments for the first time at this stage of the proceeding.

In November 1996, WinStar deployed its first switch. In the intervening months, and as additional switches have been deployed and network constructed, it has become clear that access to existing house riser -- including wire, conduit, and alternate pathways -- in virtually all buildings is being denied or, at best, made available on a highly discriminatory basis. In this regard, WinStar has attached an affidavit and chart detailing some of the limitations on access to inside wiring experienced by WinStar personnel during the past several months (see Exhibit III). WinStar must have the same nondiscriminatory rights of access to existing inside wiring facilities, including wire, conduit, and alternate pathways, as the incumbent local telephone company. "Access" to inside wire directly impacts the Company's ability to offer services to the public on an economically rational basis, and its ability to compete with incumbent local exchange carriers (ILECs) pursuant to the Telecommunications Act of 1996 (the 1996 Act).

**I. THE WINSTAR NETWORK; THE ROLE OF INSIDE WIRE AND THE WIRELESS FACILITIES-BASED CARRIER.**

WinStar constructs its Wireless Fiber<sup>SM</sup> loops on a path-by-path basis to deliver switched and non-switched local exchange services to buildings, and ultimately to customers in those

buildings. WinStar's wireless network delivers high quality voice and data transmissions which meet telephone industry standards and are fundamentally equivalent to the transmission quality produced by fiber optic transmission facilities. Multiple paths can be directed to a building.

Unlike the large antennas deployed by cellular and specialized mobile radio (SMR) systems, WinStar's 38 GHz antennas are small and unobtrusive. Normally the dishes are the size of a pizza plate.<sup>8</sup> and are placed on 4 foot tall antenna poles (see Exhibit IV). Despite their small size, the systems are capable of transceiving massive amounts of traffic. Depending on the radio equipment deployed, each path in the wireless network can currently provide up to DS-3 capacity (672 digital voice lines). That extensive amount of traffic needs to be carried from the roof (where the 38 GHz antennas are typically placed) to the customer(s) in the building. WinStar's 38 GHz transceivers, for the most part, will be located initially on the rooftops of buildings containing small- and mid-sized businesses that utilize multiple telephone lines.

The wireless traffic received by the 38 GHz transceiver on the roof is then transmitted through wireline (typically coaxial cable) which runs to WinStar indoor terminating equipment and channel banks located inside the building. Ideally, the WinStar terminating equipment and channel banks can be connected to the host building at an appropriate riser cable termination point: with respect to switched local exchange services, the most economic and effective alternative in most instances will be to establish a common connection point for all ILECs and CLECs to pre-existing inside wire, i.e., house riser, normally in the common area of each building (see Exhibit V).

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<sup>8</sup> WinStar's 38 GHz antennas range from 1-2 feet in diameter. The 38 GHz antennas are in fact smaller than home Direct Broadcast Satellite receivers.

Due to the fact that the inside wiring of most buildings, like the trunk and branches of a tree, is thickest (and thus carries the most capacity) at the base of the building and thins out (or is "tapered") as it runs to the upper floors, it is routinely not feasible to run high capacity traffic from a WinStar rooftop transceiver directly to the inside wire found in the top floors of a building. Accordingly, wireless CLECs, like WinStar, need to access inside wiring facilities which will allow them to get (1) from the roof of the building down through the common spaces and pathways (i.e., unused mail chutes, open conduit space, elevator shafts, etc.) to the main Network Interface Device (NID) and ILEC channel bank locations, and (2) then back up through the building's existing wire to each individual customer. For example, if WinStar has a contract to serve a small company which occupies floors 4, 8, and 9 of a 30 story building, WinStar typically would need to run a coaxial cable from its transceiver to its terminating equipment and channel banks and then down to the main NID, typically located on the ground floor or the basement, and then into the ILEC's 66 block and back up to floors 4,8, and 9 through the existing wire, as is illustrated by Exhibit V.

The problem faced by wireless CLECS is that access to inside wiring, house riser, and rooftops, in many instances, is not being made available on a reasonable and nondiscriminatory basis. Many landlords are exercising their monopoly power when leasing rooftop space, inside wiring and riser access. Without reasonable access, wireless CLECs effectively are precluded from offering their competitively-priced services to building tenants and residents.

Consequently, without reasonable access, consumers will be unable to realize all of the benefits of competition -- in particular the ability to choose from a wide variety of telecommunications providers -- as contemplated by the 1996 Act. In addition, cost-savings that are intended to be

passed along to the consumer, essentially will be redirected toward landlords to cover the inflated charges for rooftop, inside wiring and house riser access.

These issues are particularly critical to wireless CLECs, like WinStar, that are striving to compete in the local exchange market as facilities-based carriers. Entering the market as a facilities-based carrier is critical to providing effective competition to the ILECs and to offering consumers truly competitive telephone rates. As a facilities-based carrier, for example, WinStar is able to build highly efficient networks that provide state-of-the-art telecommunications services. In addition, the company is not subject to the economic inefficiencies often associated with ILEC service. Resale or relying on access to unbundled network elements, in the long run, simply does not provide a reliable, economically attractive model for providing truly competitive local telephone service. Companies providing resale service or leasing unbundled network elements typically would not need access to inside wiring.<sup>9</sup> By contrast, the true end-to-end facilities-based competitor, building a network from the proverbial ground up, needs affordable and reasonable building access in order to compete with the ILECs.

Most fiber CLECs are building principally backbone networks, relying on the unbundled loops of ILECs to supplement their network. By contrast, WinStar is building its own wireless network largely in place of the unbundled local loop, i.e., in practice WinStar is building "the last mile" by deploying its 38 GHz loop to the customer building. Accordingly, the inside wiring issues are of somewhat decreasing importance to fiber-based CLECs because increasingly they

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<sup>9</sup> Resale is an end-to-end service. Unbundled loops purchased by a "facilities-based" carrier to reach the end user effectively includes both the feeder and distribution portion of the loop, as well as the inside wire in the end user's building.

are choosing to reach the end user through purchase of the ILECs' unbundled local loops which include the pre-existing inside wiring of the end user's building, rather than continuing to bear inflated charges for deploying fiber to the building. For WinStar and other wireless fixed loop carriers, therefore, the critical issue is not the "last mile," but rather is the last "hundred feet" between the roof and the end user.

Finally, the Commission must remember that ILECs, and for that matter existing cable operators, already have secured access to buildings presumably on a reasonable and nondiscriminatory basis. Building owners provide access to ILECs to make their buildings attractive to potential tenants. This same treatment, however, is not being extended to CLECs. These building owners are not as motivated to provide their tenants with a choice for telephone service — a direct impediment to the goals of the 1996 Act. Rather, in many instances, building owners are treating access by CLECs and alternative video providers as a significant new revenue generating opportunity, and thus present them with discriminatory rate treatment or outright rejection. Such a turn of events simply is not fair to tenants, the intended beneficiaries of the 1996 Act. If ILECs were able to access buildings on a reasonable and nondiscriminatory basis, then CLECs, at minimum, should be afforded this same opportunity.<sup>10</sup> Without FCC intervention and the adoption of a national framework regarding access to inside wiring, riser space and rooftops, the objectives of the 1996 Act will never be fully realized.

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<sup>10</sup> To the extent that an ILEC still owns or controls the inside wire, it should make the inside wire available as an unbundled element (just as it makes the NID available as an unbundled element). For example, U.S. West largely divested itself of inside wiring, and thus would not have the underlying ownership to make inside wiring available on an unbundled basis. However, SBC, NYNEX, Ameritech and others--to varying degrees--retain ownership and/or control over inside wire and thus must be required to make it available on an unbundled basis.

## II. THE TELECOMMUNICATIONS ACT OF 1996 CLEARLY CONTEMPLATED REASONABLE ACCESS TO INSIDE WIRING FACILITIES AND POINTS OF ENTRY.

Beyond the general provisions of the 1996 Act which state that all competitive telecommunications carriers shall have unimpeded entry into the telecommunications marketplace, the 1996 Act presents clear evidence that Congress intended to provide wireless CLECs with nondiscriminatory access to inside wiring. Not only did Congress support the efforts of wireless CLECs in building out the vast majority of their systems, it also took the necessary steps to ensure that these carriers are able to complete the last few feet of their connections to end users.

For example, Section 704 of 1996 Act, sets forth that:

... Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. . . . Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

Section 704 is significant because Congress mandated that procedures would be established by which all Federal departments and agencies may make their property, rights-of-way, and easements reasonably available for the placement of services that depend on the use of spectrum. Such property undoubtedly includes inside wire facilities. Moreover, Congress gave the Commission the clear requirement to encourage States “to make property, rights-of-way, and easements *under their jurisdiction* available for such purposes” (emphasis supplied). Thus, because every building in every state is under that State’s particular jurisdiction, Congress clearly



contemplated *that every building in the country* would have its inside wire property reasonably available to providers of telecommunications services that are dependent upon the utilization of spectrum.

In addition, Congress in Section 332(c)(7) of the Communications Act of 1934, as amended, set forth parameters regarding the placing of personal wireless service facilities. While Section 332(c)(7) was primarily intended to ease restrictions on the siting of communications towers for commercial mobile service offerings, Congress specifically included a fixed service -- "common carrier wireless exchange access service[]" -- under the definition of "personal wireless services" in Section 332(c)(7)(C)(I).<sup>11</sup> This specific provision ensures that WinStar's wireless CLEC services are included under 332(c)(7) and that the "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not prohibit or have the effect of prohibiting the provision of personal wireless services." By including common carrier wireless exchange access service in the definition of personal wireless services, Congress specifically enunciated its intention to extend this favorable treatment to a non-mobile service, the wireless CLEC service.

Finally, another example of Congressional efforts to promote competitive telecommunications services can be found in Section 207 of the 1996 Act, which provides, in part, that:

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<sup>11</sup> For further explanation as to why Congress decided to include fixed services, such as WinStar's, in the plain language of the 1996 Act, see the *Joint Explanatory Statement of the Committee of Conference*, located in the Conference Report to the 104<sup>th</sup> Congress, 2d Session (Report 104-230) (February 1, 1996) of the Telecommunications Act of 1996, concerning Section 704. (See Exhibit VI).

[T]he Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.

WinStar has the ability to provide both one-way and two-way video programming to end users through its over-the-air systems. A restriction on the ability to access the inside wire of a building could certainly prevent WinStar from delivering a signal from a WinStar transceiver to, for example, an end user in a multiple tenant unit. Thus, the FCC, pursuant to Section 207, clearly has the authority to "promulgate regulations to prohibit" such a restriction.<sup>12</sup>

Taken together, these statutory provisions give the Commission the clear authority to adopt a national framework ensuring the reasonable and nondiscriminatory access to inside wiring.<sup>13</sup> In passing the 1996 Act, Congress intended to change the telecommunications marketplace, especially the local exchange business, to encourage competition. In promulgating procedures for the opening of the local loop, it did not intend for building owners and landlords to "hold hostage" the development of competition and the goal of better services and prices for consumers.<sup>14</sup>

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<sup>12</sup> On a related basis, Section 628(e) of the Communications Act of 1934, as amended, provides the FCC with both the authority to encourage diversity in the development of competition in video programming and the power to exact remedies when multichannel video programming distributors are aggrieved. As such, it is likely that other wireless systems which require rooftop access, such as Direct Broadcast Satellite providers, shall also benefit from 628(e) if prevented from accessing inside wire.

<sup>13</sup> It should also be noted that the Commission has an existing statutory mandate "to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157. WinStar suggests that the wireless CLEC service clearly deserves Commission consideration under Section 157 as a new technology that will service the public.

<sup>14</sup> Indeed, Senate and FCC probes into the lack of competition in the local telecommunications market were recently announced. *Telephone Market Probes Planned: FCC*,

**III. THE FCC'S ABILITY TO ISSUE A RULE GIVING TELECOMMUNICATIONS PROVIDERS PHYSICAL ACCESS TO INSIDE WIRING ON NON-DISCRIMINATORY TERMS, SO LONG AS THE BUILDING OWNERS ARE ALLOWED JUST COMPENSATION, IS NOT COMPROMISED BY THE 5<sup>TH</sup> AMENDMENT'S TAKINGS CLAUSE.**

In the NPRM, the FCC requested comments, *inter alia*, on access rights of service providers to cable and telephone network inside wiring located on private property. Specifically, the FCC recognized that “[p]arity of access rights to private property may be a necessary predicate for any attempt to achieve parity in the rules governing cable and telephone network inside wiring, because ... [a]n inequality in access can unfairly benefit one provider over another.”<sup>15</sup> In this, as access to inside wire is an operational and economic necessity with regard to WinStar and its fixed point to point wireless services, the FCC was absolutely right.

Further, the FCC requested comment on the authority of service providers under state, federal and common law to obtain mandatory access to private property and on:

whether the Commission can and should attempt to create access parity among service providers, and what our rules should say regarding the terms of such access. We also seek comment on any statutory or constitutional impediments to this goal. In particular, we ask commenters to address the concern that any right of access to private property may constitute an impermissible ‘taking’ in violation of the property owner’s Fifth Amendment rights.<sup>16</sup>

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*Senate Ask Why Competition Is On Hold*, Washington Post, at A1 and C11, July 16, 1997. (See Exhibit VII).

<sup>15</sup> NPRM at ¶ 61. “For instance, if one service provider has an unrestricted right of access to private property -- even over the objection of the property owner -- that service provider would be able to compete for individual subscribers in every multiple dwelling unit building, private housing development and office building, while the other provider without such a right could only compete in those buildings in which it had managed to obtain the property owner’s consent.” Id.

<sup>16</sup> Id. at ¶ 64.

Noting that telephone companies “[a]s common carriers ... can exercise the power of eminent domain,”<sup>17</sup> the FCC also stated that “[w]e realize that a number of these potential service providers are not common carriers and their right to access is not well established in state or federal law.”<sup>18</sup> The Commission is quite correct in its observation. While nascent proof exists that a small number of states have recognized the eminent domain rights of competitive carriers,<sup>19</sup> the state-by-state approach invariably acts to slow competitive entry because: (1) there is no guarantee that all 50 states will ever enact (and their courts and administrative agencies uphold and enforce) the legislation to require that building owners provide nondiscriminatory and timely access to competitive providers; (2) compliance parameters would not be uniform from state-to-state; and (3) building owners would invariably challenge the multiple state laws from multiple angles, thus creating a delay-producing, resource-sapping, inefficient ‘building-by-building’ struggle which would clearly not be in the public interest and would be a tremendous burden to developing competition in the local exchange.

In fact, the past and continuing real-world experiences of several fiber-based CLECs, such as Eastern TeleLogic and TCG, have repeatedly proven that the attempted exercise of eminent domain powers, even where ultimately successful, in virtually all instances must be done on a building-by-building basis, even within the same jurisdiction. In turn, each such attempted exercise routinely has taken many months, and at times up to two years, and involved the

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<sup>17</sup> Id. at ¶ 59.

<sup>18</sup> Id. at ¶ 64.

<sup>19</sup> See Generally, Conn. General Stat. Section 16-2471. Texas Utilities Act, Title III--Telecommunications Utilities, Section 3.2555 Discrimination. See also, Eastern TeleLogic., 1992 Pa. PUC LEXIS 95 (Aug. 10, 1992).

expenditure of thousands upon thousands of dollars in attorneys' fees, to achieve access to each discrete building. As such, even where available, the exercise of eminent domain powers does not in reality lend itself to the rapid or economic deployment of a facilities-based network.

The FCC must order that mandatory access to inside wiring on private property, especially multiple tenant units (business and residential), be provided to telecommunications service providers on reasonable, nondiscriminatory terms. The Takings Clause of the Fifth Amendment does not prevent the FCC from requiring private property owners to grant telecommunications service providers access to private property for purposes of placing rooftop antennas or laying inside wiring so that they may access individual subscribers on that property. It is well established that a federal agency can mandate a compensated physical occupation of private property in the absence of explicit statutory authority.<sup>20</sup>

Indeed, in the recently released Iowa Utilities Board v. FCC, the court supported the FCC's clear authority to mandate physical access. Specifically, the court upheld "the Commission's rules and policies regarding the ILECs' duty to provide for physical collocation of equipment to be consistent with the [1996] Act's terms contained in subsection 251(c)(6)."<sup>21</sup> Iowa Utilities underscores the fact that the Takings Clause in and of itself does not preclude the FCC from directing that a requesting CLEC be allowed physical access to the premises of the another entity (property owner) for purposes of furnishing a telecommunications service. (The Iowa Utilities court also went on to reference Section 51.323(f) of the FCC's rules which

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<sup>20</sup> Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (Bell Atlantic).

<sup>21</sup> No. 96-3321, slip op. at 151 (8<sup>th</sup> Cir. July 18, 1997).

specifically requires ILECs to take account of projected demand for collocation of equipment when planning renovations or new constructions.) Iowa Utilities clearly supports the FCC's ability to mandate access to inside wiring in the instant proceeding.

The Takings Clause of the Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation." Underlying the Supreme Court's application of the Takings Clause has been the principle that a few landowners should not be forced to bear disproportionately "the economic injuries caused by public action."<sup>22</sup> If, however, "just compensation" is provided the landowner either through private compensation or governmental compensation for use of the property, then no unconstitutional taking occurs when the government mandates physical occupation of private property for public benefit.<sup>23</sup>

The Takings Clause therefore places no limit on the FCC's ability to issue a rule that would require owners of multiple tenant units to grant telecommunications service providers physical access to inside wiring on nondiscriminatory terms, so long as the owners were allowed to demand just compensation for the costs of such access from the telecommunications service providers *after* access has occurred. It is only when owners are not guaranteed just compensation from private entities that the question arises concerning the FCC's statutory authority to issue a

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<sup>22</sup> Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

<sup>23</sup> Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (remanding for consideration of whether just compensation has been paid by the cable operator to the landlord pursuant to a state law that prohibited any owner of rental property from interfering with the installation of cable television facilities upon his property or premises). In a later proceeding, it was noted that in most cases \$1.00 should amount to just compensation within the meaning of the Constitution. Loretto v. Group W Cable, Inc., 522 N.Y.S.2d 543, 546 (1<sup>st</sup> Dep't 1987), appeal denied, 527 N.Y.S.2d 768 (1988), cert. denied, 488 U.S. 827 (1988).

rule that would require just compensation (and thus appropriation of funds) by the federal government in order to survive constitutional challenge under the Takings Clause.

Accordingly, in Bell Atlantic, in reviewing two FCC orders which would have required ILECs to set aside a portion of their central offices for occupation and use by competitive access providers, the D.C. Circuit first considered whether there was guaranteed just compensation to the local telephone companies by private entities that were granted mandatory physical access to the ILECs' property. The court concluded that there was no guarantee that the rate tariffs approved by the FCC, which were designed to allow the ILECs "to recover the reasonable costs of providing space and equipment to co-locators" from the competitive access providers would equal or exceed "the level of compensation mandated by the [Takings Clause of the] Fifth Amendment" for governmentally-ordered physical occupations of private property.<sup>24</sup> Only after considering the issue of the adequacy of private compensation did the court consider the FCC's statutory authority to expose the federal government to takings claims arising out of its orders. It finally concluded that absent explicit or implied statutory authority to order a physical invasion of private property, the FCC could not issue a rule that might expose the federal government to millions of dollars in takings claims for uncompensated or inadequately compensated mandated physical invasions of private property.

Neither the Takings Clause nor the analysis in Bell Atlantic limits the authority of the FCC to issue a rule that would require private property owners to grant access to inside wiring to telecommunications service providers on terms that would allow property owners just

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<sup>24</sup> Bell Atlantic at 1444 and 1445, n.3.

compensation from the private service providers, and that accordingly would not require compensation from the federal government. Nor does the Constitution or Bell Atlantic limit the authority of the FCC to provide a private enforcement mechanism for ensuring that the compensation private property owners charge telecommunications service providers for mandatory access is at or above the constitutionally required minimum of "just compensation," and yet reasonable to service providers, so long as this entails an opportunity for judicial review.

In Bell Atlantic, in which the court concluded that there was no guarantee that private compensation would be equal to or in excess of the constitutionally required minimum under the Fifth Amendment, the FCC was to set the rates charged by ILECs -- in compensation for forced physical occupation -- pursuant to a statutory ratesetting standard rather than in reference to the constitutional standard of ensuring "just compensation." If, in contrast, the FCC's rule in this matter requires that the private compensation provided to private property owners for mandatory access to inside wiring must comport with (and be judged strictly against) the constitutional standard, then the FCC's rule and rate determination (subject to judicial review) would ensure that there would be no unconstitutional, uncompensated takings.

The FCC can accomplish this goal by mandating that the access obligation would apply universally, but would allow individual parties to negotiate over "just compensation" and obtain a judicial determination of what justice requires in any particular case. Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), is one vehicle the Commission can use to implement such a system. Under Section 401(b), "[i]f any person fails or neglects to obey any order of the Commission other than for the payment of money, ... any party injured thereby ... may apply to



the appropriate district court of the United States for the enforcement of such order.” The statute directs the court to enjoin anyone duly served with the order from disobeying it.

To create this type of compensation arrangement, the FCC should issue an order directing all property owners to permit any alternative service provider onto the premises. Once access has occurred, a property owner who felt he was being under-compensated would be permitted to raise that issue by way of defense, which would squarely present for judicial resolution the question whether the tendered amount was just and reasonable under constitutional standards.<sup>25</sup> Moreover, building access on a reasonable and nondiscriminatory basis is not a new concept for building owners. A market-based, proxy model already exists for building owners to charge wireless CLECs for building access. Building owners themselves have already set the parameters. At a minimum, since 1990,<sup>26</sup> the parameters of expected compensation are properly defined by the current rates charged by building owners to ILECs and cable operators. Thus, in determining rates that are just and reasonable in each given instance, the Commission and any reviewing court need look only as far as the rates that are currently paid by the ILEC and incumbent cable operators for access to inside wiring in any given building in question. Consequently, it may reasonably be argued that a proxy model based on existing charges by a

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<sup>25</sup> CLECs and CAPs would, of course: (1) pay construction costs for installing their network in a building; (2) indemnify building owners for any damage they or their contractors caused to the structure; (3) submit detailed drawings for building owner review; (4) pay to install and maintain their network equipment and wire to customer premises; (5) protect the landlord from any liability associated with the network installation and operation; (6) assume all responsibility for quality of service to customer; and (7) by their very presence, enhance the value of the building for the landlord and the tenants.

<sup>26</sup> In the Matter of Review of Sections 68.104 and 68.213 of the Commission’s rules Concerning Connection of Simple Inside Wiring to the Telephone Network, Report and Order and Further Notice of Proposed Rule Making, CC Docket No. 88-57 (1990).